

Wednesday, 3 December 1947

INTERNATIONAL MILITARY TRIBUNAL  
FOR THE FAR EAST  
Chambers of the Tribunal  
War Ministry Building  
Tokyo, Japan

Second Conference  
On  
Procedure Regarding Summation

Before:

MAJOR GENERAL MYRON C. CRAMER,  
Acting President of the Tribunal and  
Member from the United States of  
America, :

HON. E. STUART McDougall, Justice,  
Member from the Dominion of Canada, and

HON. BERNARD VICTOR A. ROLING, Justice,  
Member from the Kingdom of the Netherlands.

Reported by  
Lorraine Yelden  
Court Reporter, IMTIE.

Appearances:

For the Prosecution Section

Mr. Joseph B. Keenan, Chief of Counsel

For the Defense Section

Mr. George F. Blewett  
Mr. John G. Brannon  
Mr. Alfred W. Brooks  
Mr. George A. Furness  
Mr. Kiyoshi ITO  
Dr. Ichiro KIVOSE  
Mr. Michael Levin  
Mr. William Logan  
Mr. L. J. McManus  
Mr. Toshio OKAMOTO  
Mr. N. SASAGAWA  
Dr. Kenzo TAKAYANAGI  
Dr. UZAWA  
Mr. George Yamaoka

For the Secretariat

None

The proceedings were begun at 1607.

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ACTING PRESIDENT: Since the last conference we had with you gentlemen about ten days ago the Members of the Tribunal have been considering the matter and this is a general outline of what we have decided in the way of the final arguments and summation in general, and I want to read it to you and get any comments that you have to make about the details of it.

First, full written summations of their arguments--that means arguments of prosecution and defense--will be prepared by the prosecution and defense and will be lodged with the Tribunal and with the other side. Wherever evidence is referred to, exhibit numbers and references to pages of the record will be given. These may be given in footnotes. These written summations will be read in court, all repetitious argument and references to exhibit numbers and pages of the record being dropped in the reading.

In reading the summations the prosecution will open; the defense will follow; and the prosecution will have the right to reply if so desired.

Apart from their summations and defense of their individual clients, counsel for the defense will be permitted to ledge and read summations on law and

general phases. Only one summation will be permitted on any one topic. Only one counsel will be heard on behalf of the prosecution on any one topic.

Here are suggested additions: In its desire to have the full assistance of counsel in assembling for decision the material bearing on the complex issues of this case, the Tribunal has not imposed arbitrary limits of time to be occupied by the speeches in public. This must not be construed as a license to indulge in prolixity or irrelevancy in the written summations, and if these are put the Tribunal will restrict the amount of the summations which it will permit read in public.

I might say the background of this is as follows: What we want is that the prosecution and defense put in their various documents. They will have there a complete history with reference to the page number of the transcript or exhibit number, or whatever subject they are covering, so that we can take that and follow it right down in its completeness. While you have noticed those various references need not be read in court, we want a complete document so we can go to work on those documents with the full story of everything that is there and everybody involved.

MR. JUSTICE McDougall: Those title pages

and references can then be taken in the record.

MR. FURNESS: Did you say "footnotes"? Put them in footnotes?

MR. JUSTICE McDougall: Either way as long as they are not read.

MR. LOGAN: On that question of repetitiveness, of course, it would not be permitted--no repetition in one individual counsel's argument--but, for example, supposing some other accused is depending on some particular piece of evidence that I am depending on, does that mean that either one or the other of us must drop it from our argument?

ACTING PRESIDENT: These are some of the things we want to get your comments on; how it is going to work out.

MR. LOGAN: It just came to my mind. I don't know whether there will be such an occasion but I can readily imagine that there might be.

MR. JUSTICE McDougall: I think the answer to that, Mr. Logan, is this. The Members of the Tribunal are definitely more interested in what you put before us in writing. What we want is to get your complete argument documented. The question of time is a very difficult one and on that I have a question later; but the condition as to nonrepetitious matter,

I would suggest that perhaps the answer to your question might be, Mr. Logan, that if the same topic is being dealt with in substantially the same way, we might have to stop one counsel who is following another who had developed the same subject. But that doesn't mean that we wouldn't get it. I personally don't care what you say in open court--the shorter, the better.

We know that there has been a public statement and we know it has to be a public hearing, but the reason for the dropping of the page references and exhibit numbers, and so on, and putting it in footnotes is to limit the amount of words that are going to be spoken and taken down. For that reason we hoped that we could get some assurance that if no time limit is fixed, that there would be really some limit to it, and that was the one question I asked the President if I could ask at this meeting and he agreed: Is there any assurance we can get? We know within certain limits what the prosecution will be, I imagine, but with twenty-five addresses of defense counsel, is there any assurance you can give us that this will not run into three or four months of talk?

MR. LOGAN: No possibility of it.

MR. JUSTICE McDougall: This is not a decision

of the Tribunal but I feel very strongly on it because I personally will not get much good out of what you say over the microphone. I am too busy and there are too many distractions. I will count on what I read, and I think most Members of the Tribunal feel the same way.

MR. LOGAN: As far as time is concerned, the way we have discussed it, one month will cover it all, I am quite sure.

MR. JUSTICE McDougall: That would get back to your original twenty-five days, roughly.

MR. BRANNON: My personal opinion--and I am not speaking for the group--is that there will be some arguments that may be read in an hour and a half and there may be some that will extend over past a day; but those that will be short will greatly outnumber the long ones, especially if it is in writing. We don't consume so much time in the reading. It is extemporaneous speaking that takes a long time, so in talking to my colleagues I was surprised to learn that many of them didn't think that they would exhaust over two or three hours at the most. That is why, at the last meeting, I suggested that we not be given a stated time. You might give me one day and I may take a day, otherwise I may take only an hour and a half,

as I want the appearance to be that I am doing my best to defend my client.

MR. JUSTICE McDougall: Of course, if you put it that way, if we give you a day and you only need an hour, if we give you unlimited time how long are you going to take?

MR. BRANNON: My suggestion is that I will get the job over with and done as fast as I can with no limit.

MR. JUSTICE McDougall: I personally would like to feel that we are not going to lead to prolixity by opening this thing up.

MR. LOGAN: I don't think the Tribunal should have any apprehension on that at all.

MR. BROOKS: Speaking from experience in handling these documents, since the summations are going to be in writing and have to be prepared by our mechanical facilities, that is going to limit to a great extent our putting anything in the form of prolixity in these arguments because we are going to be crowded with the services we have in processing.

MR. JUSTICE McDougall: The other question I was just asking the President was this. There is a reference in this memorandum to general questions, questions of law. Has the defense any idea of

allocating that work to any individuals and making a special phase of it for a given time, or what?

MR. BRANNON: I think we have, Mr. Keenan, about five broad subjects that we wanted to cover by argument on law, and I think we have taken most of those subjects from the matters touched by you in your opening statement. Now, we would like to be able to present those arguments separately from the individual arguments.

MR. JUSTICE McDougall: As a general argument?

MR. BRANNON: As a general argument by individual counsel, maybe four or five, I don't know, and then after those we will argue our individual case. In that way we feel that we will not have to repeat ourselves so much.

MR. JUSTICE McDougall: No. In your thinking over of those five topics, five general subjects, questions of law, have you any idea as to time or length of time?

MR. BRANNON: We feel, I think--and I stand to be corrected by my colleagues if I am wrong--that perhaps a two-day period would suffice.

MR. JUSTICE McDougall: For the five topics.

MR. BRANNON: Our interpretation of the law, Judge. For example, we might want to argue The Hague

Convention III, commencement of war, our interpretation of it, and so forth.

MR. JUSTICE ROLING: In talking about general topics as, let me say, the fact if there was an undeclared war, that assumption that has a bearing on several individual cases, how is that to be treated? Is it your plan by one of the counsel?

MR. BRANNON: I can say it will definitely limit, perhaps, the necessity of going into detail, but we certainly don't want to be hampered in our individual arguments on those particular points. That is, I think you can trust us not to repeat unless we feel it is necessary as applied to our own individual accused. I may refer to something like this: "I incorporate herein the remarks made by my colleague, Mr. Logan." That would be sufficient, I think.

MR. LOGAN: You might also point out that there are several of the accused who have special interest in one or two points of law. Instead of treating that point in the general statements of the law that individual accused's counsel will cover that in his individual argument.

MR. JUSTICE McDougall: In other words, the defense panel are really coordinating your work?

MR. LOGAN: Very much so.

MR. BRANNON: We are definitely trying to.

MR. JUSTICE McDougall: If you think along those lines--

MR. BROOKS: We have had more than ten meetings on this situation in the last six weeks or eight weeks.

MR. JUSTICE McDougall: I felt great apprehension about the whole thing when it was unlimited, but I don't feel it quite as keenly now.

MR. LOGAN: I don't think you should have any misapprehension about that.

MR. KEENAN: In the first place, the prosecution believes it is a plain departure from the mandate of the Charter in requiring the prosecution to present its argument first. That, however, is to be decided by the Court and I am assuming it is decided. I think it is wrong. I don't think the Court is authorized to direct that procedure but if the Court interprets the Charter, that is its business.

Secondly, with reference to no time limit. I think it is a very grave error and will lead to a very, very prolonged argument that is entirely unnecessary in the premises. I do think that the employment of briefs, and I imagine the Court's notes were rough on the subject--I mean they were not intended

to be complete in detail--that we would be entitled to present briefs as would the accused.

It does seem to me that the long recitation in court, as suggested by the defense counsel here of one day per accused, which would mean twenty-five court days or five weeks, is entirely unnecessary and burdensome. I have no particular individuals in mind but I have observed the record in this trial and the zeal of counsel for the accused. I think it is improper that we leave the matter open.

This Court is thoroughly familiar with the facts that were presented in this case and it does seem to me that a great deal can be said in a short period of time when an argument is carefully prepared and read in the courtroom; and the mere contemplation of listening, sitting in the courtroom, for five weeks to the grinding out of arguments, most of which will have no value to this Court other than the study that will be given to the written document, it seems to me that with the permission to file briefs a limitation of two hours, or at the most a half-day, for each one to meet his obligation in defending his individual accused amply takes care of the situation. I don't think that much will be used, and we hear from accused counsel during these meetings, one says I am not going

to take more than an hour, an hour and a half. It is just human nature that if an unlimited time is given many counsel will feel it necessary to take all the time he pleases.

I think it is a matter for direction. In a novel case of this type I very, very strongly advocate some limitation of time and then I think it should be left up to the counsel for the accused not to employ any more of that time than he had to. I would suggest that if a limit were fixed, it would be quite proper--this is merely a suggestion--to have a counsel who feels that that is not adequate for his case to make an application to the Court to have an extension of time.

In the Nuernberg hearing the Court did permit Goering's counsel, and perhaps one or two more, to have additional time than the individuals were expected to employ. I just think we are going to run into something chaotic, long drawn out, and I don't think it has merit, the suggestion -- I think that it cannot be said, Mr. President, that when the right to file a brief is given to each individual accused that he is in any danger of having his rights ignored or not fully protected.

I had thought that there would be a concrete

plan for a certain length of time for discussion of the law and perhaps a certain length of time addressed by one or more counsel to whether or not there had been a conspiracy shown or a crime committed. It might be, I recognize, among these accused that there are several classifications. From the viewpoint of the prosecution one or two of the accused occupy very peculiar, unique positions, and it would require ample argument, both for the prosecution and the defense, to cover their cases, but I most respectfully urge that some limitation of time be placed upon this argument.

ACTING PRESIDENT: As to the time, there are two elements. One is, this has been a two-year trial and you can't cut it too short to give a proper length of time for both the prosecution and defense. The other is, if we set a limited time that is too short, we are afraid that your final statements over all the facts and law and everything else that we want, with the citations, will not be as thorough as they should be. Now, we want to match those two together.

MR. KEENAN: That sounds logical. Right on that very point, is it not true that this Court could give the same amount of study and consideration to an argument that is lodged in writing with the Court, whether it is repeated in open court or not? What is

the purpose of long arguments in a courtroom?

MR. BRANNON: It is a Charter provision.

MR. KEENAN: The Charter says only that there shall be summations by both sides.

MR. LOGAN: It also provides, as I remember it, the accused should hear everything that goes on in court.

MR. KEENAN: Everything that goes on in court, but why insist on having all the arguments? The arguments are no part of the evidence; at least I hope not. The evidence is already before the Court. It is a matter now of summing up to assist the Court. It isn't an opportunity for an exhibition; we want no hippodrome out of this trial.

MR. LOGAN: It is a different matter if one accused makes an accusation against another accused in summation both of the accused should know it, and there is no other way they can know it except hearing it orally in court.

MR. KEENAN: What are you going to do about it? Are you going to have accused No. 1 come back and make another argument in open court?

MR. LOGAN: Accused No. 1 would at least have an opportunity to answer.

MR. KEENAN: Why should accused No. 1 have an

opportunity to answer? If accused No. 7 makes an accusation against accused No. 3, is accused No. 3 going to answer No. 7?

MR. LOGAN: I think it is time that this Tribunal was advised of the fact that the prosecution are not the only ones that have a corner on this argument of saving time. I think the defense has done its utmost, with all that it has had to contend with, in getting this case over as quickly as possible. Some of us have culled through our documents that we intended to present and we have ditched them as repetitive, corroborative, and so forth, and I don't see why the prosecution should continually bring that up as if it is our fault.

Furthermore, Mr. Keenan, with respect to summation, we American attorneys feel it is our duty to try to present our summation in a scholarly manner, in an orderly procedure, as something that history will record. We are not trying in any way whatsoever to drag this trial out.

That is our position and we are conscientious about it. We want to assure you and the Tribunal that that is our position.

MR. KEENAN: I am speaking from the cold record in this case--there is nothing personal addressed to

anyone, nor am I adverting to the conduct of any accused's counsel--but I would say that at least one-third of this record was filled with unnecessary comment in the courtroom of counsel. That is a conservative estimate and I have no reason to believe there is any change of attitude in that respect.

MR. LOGAN: Of course, Mr. Keenan, you probably do realize it but have forgotten it for the moment, that we have had difficulties with Japanese counsel and Japanese accused in deciding just what evidence is to be presented and what is not. If there have been any delays, that is where they lie. It is a difficulty. We have had something to overcome.

MR. JUSTICE McDougall: This is a meeting to decide what we are going to do. We are now getting into an argument between defense and prosecution.

MR. BLEWETT: Mr. President, for the written summation prepared and lodged with the Tribunal, how much time would you require that before the presentation? Would you say three days, the same as for the affidavits?

ACTING PRESIDENT: Three days or as soon as you can, but we want to know about your mechanical troubles that you will have on that. I think you can probably do it without any trouble by making it three

days ahead, can you not?

MR. BLEWETT: We probably could be able to do it. I don't know whether we still have the force we had while we were putting on the general phases or not. It probably has been very much depleted because as people have gone and taken other positions their jobs have not been filled.

MR. KEENAN: I can state this, Mr. Blewett, that as soon as we get through--we have to go first--as soon as we finish you can have practically our whole processing personnel if you want it.

MR. BLEWETT: That would be a great help.

MR. KEENAN: Because they are here to serve a common purpose. We would be very glad to do that, any mechanical assistance that is possible.

MR. JUSTICE McDougall: You will need something to prepare your reply.

MR. KEENAN: I am not so sure about that.

MR. JUSTICE McDougall: That is one of the possibilities.

MR. JUSTICE ROLING: Is the prosecution prepared to start at once after closing of the evidence?

MR. KEENAN: Yes, we will be. We take it that we can expect this hearing to consume another two weeks at least.

MR. BRANNON: Will we have the benefit of seeing the prosecution's argument before ours is prepared?

MR. KEENAN: I made the statement before that just as soon as we have it finished, Mr. Brannon, we will be very glad to lodge it with the Court or, if it takes a little longer for the translation, we would be very glad to turn over the English copies to you when they are completed.

MR. YAMAOKA: That would be very helpful.

MR. BRANNON: In other courts, Mr. Keenan, as we sit back and listen to the prosecution orally argue their case we can immediately get up, answering extemporaneously; this way we are encumbered with the writing process so if you could help us in advance like that it would be very much appreciated.

MR. KEENAN: There will be some things in our summation that will, I think, properly set forth our views as to liability and I think you ought to have that. I think it may shorten your arguments because, for example, our claims as to responsibility of army officers and the like, or diplomats, and what our theory is, I think you ought to have that in order that you could better prepare your defense. That is set forth adequately in our opening statement.

MR. LOGAN: That will be very helpful.

MR. KEENAN: And I think we could even do this: that if we don't have our summation completed even in its final form we would be very glad to get out a draft for you setting forth what our legal propositions are with respect to the various accused. I think we can be helpful that way, and you can be sure, Mr. Logan, we will be more than anxious to do it. It is not the type of trial where we have any desire to hold anything back.

MR. LOGAN: Knowledge of that would perhaps shorten the defense's summation ahead of time.

MR. BRANNON: As I understood the Justice to say last time, it would be greatly appreciated by him if the defense could answer the prosecution's allegations. Whether the prosecution goes first or not, it would be immaterial.

MR. LOGAN: We must have it in advance.

MR. BRANNON: That is why I am bringing up the question.

MR. BROOKS: I was going to say that if the prosecution's statement is accurate and is carefully prepared, it will undoubtedly save an enormous amount of time on the part of the defense in answering and would possibly eliminate our going into many points of

fact as well as law if it is clearly and concisely placed on the record and if the statements and references to the record are checked beforehand so that we will not have to point out innumerable misquotations and errors.

MR. KEENAN: I think too, General Kramer, that we could agree to this. I see no reason why we shouldn't. We are taking this up in sections, not exactly following the presentation as was broken down for the presentation of the case itself, but as we finish the various sections we can turn those over, turn copies over to the accused. For example, the Manchurian phase, the China phase, are already finished as to the facts and the evidence, and we would be glad to turn that over to you very shortly because I think as much advance information as you can get will be beneficial to both of us. We are looking to the same thing.

MR. LOGAN: May I ask this question: Is there to be a general argument by the prosecution in addition to taking each one of the accused separately?

MR. KEENAN: Yes, at this time I suggest-- I think I did it in the last meeting--that the Court could give us some directions because of the extraordinary nature of this trial. I think sometimes that

is done in national domestic trials where there are meetings between counsel and the court. For example, the question of jurisdiction. Now, that question has been raised already and I believe that the Court overruled the motion of the accused as to the jurisdiction. I don't know whether the question is open or not. I would like to know about it because it certainly would save some time.

I might state, first of all, that as to the jurisdiction of this Court and of the right of General MacArthur to establish it, the prosecution doesn't intend to offer any law or argument whatsoever. We take it that this Charter as it stands is binding upon the accused, binding upon the prosecution, and, with great respect, binding upon the Court itself. So, as to questions of jurisdiction, we would like a direction from the Court. First, is it a matter that the Court cares to hear anything about at all?

ACTING PRESIDENT: Of course, that question of jurisdiction was taken up at the very start. I think at the time of indictment, when the accused were arraigned, or shortly after, and then the defense started to enter into that argument again at the close of the prosecution's case. I have forgotten his name--some Japanese attorney--had a long document on

international law and, as I remember it, Justice Webb at that time told him that that was not the proper time to present it but that he would have a chance to present it at the end of the case.

MR. KEENAN: Then the question is open?

MR. LEVIN: Might I interject this? I think General Cramer has reference to Dr. TAKAYANAGI's argument. That was not the proposed argument on jurisdiction at all but on the legal questions involved, the question of conspiracy under the Charter, and President Webb did state--and I think it was repeated on subsequent occasions--that he would have an opportunity to present that argument. It is my recollection that after the questions of jurisdiction were argued the Tribunal denied the motions and stated that it would file a decision in a subsequent opinion. I have examined the record only recently--

MR. FURNESS: It says, "for reasons that will be given later."

MR. JUSTICE McDougall: Isn't this question perhaps more academic than practical at the moment, for two reasons? While it has been held out, by implication if you like, that something more could be said by the defense on this question--this legal question of jurisdiction--there are two points. First of all,

we don't propose and I don't suppose you propose to offer the same arguments over again. There may be some new arguments on that question of jurisdiction, but as those will be covered in your two days of general argument I think we can afford to be generous and say, even if there are new points, that would be the time to raise them. If there are no new points we don't want the same arguments over again.

MR. KEENAN: The trouble, Mr. Justice, is, I think, there may be some confusion in the mind of counsel as to just what matters have been determined. You talk about jurisdiction. It is natural to expect that there is going to be a discussion on what constitutes aggressive warfare, but I am talking now, first of all, about the right of the Supreme Allied Commander to establish this Tribunal and to define the crimes as set forth in the Charter.

MR. JUSTICE McDougall: As I understand it, Mr. Keenan, and I think a number agree with me if not all, that we heard motions attacking the jurisdiction of this Tribunal--the pure question of law that the Tribunal had no right to sit and adjudicate on the counts of this Indictment. That was fully argued and those motions were all denied or dismissed. Therefore, the Tribunal has jurisdiction to hear the

counts in the Indictment. Now, as to the question of aggressive war, that is another question entirely; it has nothing to do with the first.

MR. KEENAN: That is right.

MR. JUSTICE McDougall: The question, what is aggressive war and what isn't, is a matter for argument undoubtedly, or whether this is an aggression, adopting the Nuernberg attitude. In the Nuernberg case they said this at least comes into the field and that is a question, of course, which will have to be decided.

MR. KEENAN: We expected to do that.

MR. JUSTICE McDougall: That has nothing to do with jurisdiction, in my opinion.

MR. KEENAN: I thought not.

MR. JUSTICE McDougall: It is a question of law, perhaps mixed law and fact; but the question of jurisdiction has been decided.

MR. KEENAN: I don't raise that question at this time to put any vexatious matter before you. Since we have the obligation to go forward we don't want to anticipate an argument if we don't have to because we intend to make our summation completely cover all matters that we think are germane, even to anticipating the arguments of the accused counsel.

MR. JUSTICE McDougall: I do think that the implications from certain remarks from the Bench, that the air should be cleared on that question as to what argument is to be made or such questions.

MR. FURNESS: I think Dr. TAKAYANAGI's argument was to state the defense's theory of the law in answer to the statement by Mr. Keenan in his opening statement as to what their theory of the law was. He thought therefore it was proper for the defense to make such a statement at that time.

MR. BRANNON: And that has to be fully answered yet.

The right of the Supreme Commander to constitute the Tribunal, I don't think we intend to bring up at all although they intend to renew the earlier motions that were made.

MR. JUSTICE McDougall: I have never understood that.

ACTING PRESIDENT: I want to ask Mr. McManus about that. He said he wanted to join in those motions. What do you mean? What motions?

MR. McMANUS: Before American counsel came here there were several of the accused represented by counsel, those men who were on the spot at that time. There were four or five, or maybe eight or nine

motions made and which only the American counsel representing those four or five joined in; but the other accused did not join in. So when American counsel arrived for the other accused, why they have not joined in those motions.

ACTING PRESIDENT: What was the nature of those motions?

MR. McMANUS: All the motions that were made before we arrived here.

MR. LEVIN: Motions of jurisdiction.

ACTING PRESIDENT: Haven't you covered all that when you made your motion to dismiss at the end of prosecution's case?

MR. KEENAN: If it would give the accused any comfort to follow the American practice in criminal trials where there are juries to renew the motion at the end of all the evidence which, I take it, is merely a matter of preserving rights technically on appeal--

MR. BRANNON: Not admitting a waiver, in other words.

MR. KEENAN: --we certainly have no objection to having the record show that all motions were made on behalf of all accused.

MR. JUSTICE McDougall: That could be stated

in your summation in one paragraph.

MR. McMANUS: I wanted to check my client's interest to know that he joined all the motions--I intended to make no argument--presented before we arrived. I just wanted to make sure that my client's rights were protected by having joined in those motions. With Mr. Keenan's concession I am sure I shall be satisfied.

MR. BROOKS: That can be done in summation by a mere statement.

MR. KEENAN: Or it could be done in a stipulation if it means anything. It could be done in three lines in the courtroom and there would be no objection to it--renewing all motions and letting the Court take any action it wants, but without any argument. Is that correct?

DEFENSE COUNSEL (Unanimously): Yes.

ACTING PRESIDENT: That could be done at the end of all the evidence before the arguments start.

MR. LOGAN: Then, of course, there is an additional motion which also can be included in summation that not only has prosecution failed to make out a case but on the basis of the evidence adduced in the defendants' case, it now shows that they are innocent, that there is no evidence beyond a reasonable doubt.

MR. KEENAN: I really don't see--

MR. JUSTICE McDougall: It really doesn't matter. It is hardly necessary to put it in; you would only embarrass the Tribunal.

MR. KEENAN: Unless we are advised to the contrary that the question as to jurisdiction has already been passed upon by the Court, we do not need to address any arguments purely as to jurisdiction in summation.

MR. BRANNON: I didn't understand that to be the case at all. Dr. TAKAYANAGI has been given permission to make his argument and it is all prepared. I know he intends to make it and the majority of defense counsel would like him to make it; but I just withdrew from his argument the element of attacking the right of the Tribunal to sit, that is, the Supreme Commander's appointment of the Tribunal. That issue is out; but he will attack the jurisdiction of the Court in another sense. We want to be on record as not agreeing to waiving argument on jurisdiction.

MR. FURNESS: When you say that issue is out you mean out of his argument.

MR. BRANNON: And probably will not be argued as a general matter at all.

MR. KEENAN: We expect them to repeat the same argument.

MR. JUSTICE McDougall: He wasn't allowed to finish it. He got started and was stopped. Is that a very lengthy argument?

MR. BRANNON: Not too long.

MR. LEVIN: About forty pages, I believe.

MR. BRANNON: That is typewritten, not legal size.

MR. LEVIN: It shouldn't take over an hour and a half.

MR. JUSTICE ROLING: It involved a problem of fact too; it wasn't only a question of law, as I remember. It was depending on facts that had to be proved.

MR. LOGAN: That is right.

MR. JUSTICE McDougall: Of course, that is still a question of jurisdiction. There were certain phases in which the facts weren't proved and we naturally couldn't deal with until the facts were proved to bring them within the scope.

MR. KEENAN: I don't think I understand that.

MR. JUSTICE ROLING: To give an example, Mr. Keenan, there was a question of our jurisdiction in the Russian affair because it was said the Russian

war had nothing to do with the Pacific war. That is a question that couldn't be decided in the beginning because we didn't know a thing about the facts; now the facts are there.

MR. KEENAN: That is more a question of whether or not there has been a proof of a crime, or is it a question that really runs to the jurisdiction of the Court?

MR. JUSTICE ROLING: Jurisdiction, I think.

MR. JUSTICE McDougall: It might go to the jurisdiction of the Court.

MR. KEENAN: We will have to study that.

MR. JUSTICE McDougall: Just take an example. Suppose they referred to the South African War of 1900. Until we got the facts connecting the South African War of 1900 or the Crimean War of 1864 with the Pacific War of 1941 there might be a question there that it didn't come within the scope of this declaration or that declaration or the Charter, until the dates of that war were given and the facts proved. That is all Judge Roling has in mind.

MR. KEENAN: I think I understand what you mean by jurisdiction.

MR. McMANUS: I have one other point, General. It is purely administrative; but, Mr. Keenan, do you

have a stenographic pool whereby one or two of the defense counsel might call upon a stenographer from that pool? The reason I state that is because Mr. Blewett and I are sharing the same secretary--this is purely an administrative defense problem--but Mr. Blewett is preparing TOJO's case and I have to work on the summation to start right in, so it is very, very difficult for one secretary to handle the situation as it is now.

MR. KEENAN: I don't think we have to burden this meeting with that. We will let you have any stenographic service if we don't need it ourselves.

MR. JUSTICE ROLING: I am still not quite clear about one point. Did you state, Mr. Keenan, that the prosecution will present its summation in general phases and not individual phases?

MR. KEENAN: We intend to discuss some of the phases in the manner in which they have been presented in the prosecution's case. For example: We intend to discuss the Manchurian phase as such; we intend to discuss the China phase as such; we intend to discuss the Soviet phase; we intend to discuss--rather grouping together--the ABCD, or the Western, Powers. We are not going to follow the outline that we used in presenting the evidence because we think it necessarily cumbersome.

It will be simplified; but we will discuss the law of the case; we will discuss or claim that a conspiracy took place and the various parts of it, break it down into those sections. Then when we get through we will address ourselves to the matter of the various individual accused, one after another, in attempting to relate our theory and the evidence and pointing out where they fit into these various conspiracies because we believe that will be more helpful than anything else to the Court.

MR. JUSTICE ROLING: Has the defense realized the problem of meeting those general phases, following an individual order that is alphabetical and starting with some accused who is only slightly involved in the general issues, and having to meet on some big problem that could be better argued apart from the individual phases, or especially connected with one who is involved? Has that already been discussed between you?

MR. BRANNON: Judge, it has been and the stumbling block to handling it in phases like that is that individual counsel do not want to relinquish their right to argue those facts. I might add that in our general arguments there will be some discussion of those points. It will not be confined entirely to

the law but there will be a touching on some of those anticipated points of the prosecution.

MR. KEENAN: That is, you haven't been able to work out a plan, Mr. Brannon, of having one or two men discuss the law and one or two discuss whether or not a conspiracy as such has been proved, and then perhaps another subject or two, and then to confine the rest of the argument to the parts the individual accused are supposed to have taken, in negation of any claim with reference to them.

MR. FURNESS: I think Judge Roling was speaking of general phases on the facts, were you not?

MR. JUSTICE ROLING: Yes.

MR. FURNESS: I don't think we can work out a general agreement on the part of every accused to make a general defense on each phase because they do not agree.

MR. JUSTICE ROLING: I was especially thinking of, "Was the war undeclared?" That has been an issue. That is something that is generally affecting all the individuals who were involved in it and it is an issue that is more or less unconnected with one individual phase . . . was it or was it not undeclared? was it in time or wasn't it? -- all the things that have been brought up by the prosecution.

MR. FURNESS: What I had in mind was that one accused might say he advised against war; another accused might justify war and try to say it was all right. In that case they both can't agree.

MR. KEENAN: Justice Roling, was that question you asked relating mostly to a matter of law?

MR. JUSTICE ROLING: No, just to the facts because the law can be discussed in general.

MR. KEENAN: The facts as to whether it was undeclared war?

MR. JUSTICE ROLING: The facts if the declaration was--

MR. JUSTICE McDougall: Interpretation of the notes.

MR. JUSTICE ROLING: --If it was in time; if it was just negligence on the part of the Japanese Government that it was too late, or that it was on purpose.

MR. KEENAN: We intend to discuss that fully.

MR. JUSTICE McDougall: I suppose some of the accused will discuss that same question, those who are directly concerned with that phase.

MR. BRANNON: We are going to discuss generally as many matters as we can, which all agree upon generally; but if there is a divergence of opinion it will

have to be related to the individual arguments.

MR. BROOKS: There is still a further solution to that in some instances. Some of the accused, although it will not be a general statement as the first one will be, but there may be four or five men who will get together on certain matters on which they are closely concerned. We will not have repetition though.

MR. KEENAN: I think it might be helpful too to state that we intend to group these accused in our arguments into classes, and I think it would be helpful to get that information to you.

MR. BRANNON: We would appreciate it.

MR. JUSTICE McDougall: How long do you expect to take, Mr. Keenan? The prosecution--twelve days, ten to fifteen days or what?

MR. KEENAN: I will not take more than twelve days under any circumstances. I hope it will be more like ten.

MR. JUSTICE McDougall: With the elimination of the references, perhaps it might even be less. A good deal of time is taken up in reading exhibit numbers, page references, and so on. If those can be put in either by way of footnotes or in separate paragraphs so that the reading will be facilitated, it

might save some time.

MR. KEENAN: I don't know that I clearly understood the matter as to briefs, whether the suggestion of General Cramer really amounted to doing away with briefs.

MR. JUSTICE McDougall: Your speech will be a brief; that is what it will be.

MR. JUSTICE ROLING: The whole brief will be taken, with all footnotes and with all the references to exhibit numbers.

MR. JUSTICE McDougall: It may not be necessary to have the reporters take it down because you can multigraph it and it can be put in the record.

MR. KEENAN: That is a very helpful suggestion, that we could put it in the record, the document, as is, and just have the reading in the court confined to that part as suggested, leaving out the footnotes.

MR. JUSTICE McDougall: And the reporters need not copy it down because you can mimeograph or multigraph it as many times as necessary and we can order it to form part of the record in that form. The whole thing will go in but the footnotes will be merely disregarded in the reading. They are not read but they are there and form part of the document. It is a brief well documented, we hope--a well documented brief--the

reading of which will consist only in reading the substance and not the references.

MR. KEENAN: I think that is a very helpful suggestion.

MR. LOGAN: I know in my motion to dismiss at the end of the prosecution's case I had footnotes but they didn't put them in the record.

MR. JUSTICE McDougall: It is only my suggestion but I don't know of any reason why the reporters should take a word down because they can be ordered to be put in as the official record and everything will be there, the footnotes, references and appendices, if any.

MR. FURNESS: Will there be any interruptions?

MR. JUSTICE McDougall: Any interruption of what?

MR. FURNESS: Of arguments.

MR. JUSTICE McDougall: I think not.

MR. LOGAN: May I make this suggestion that there may be several questions--I don't say there are but if there are any questions--about this document you read at the beginning; that after we have a copy of this record of today's proceedings defense can go over it and prosecution can go over it and we may have several more suggestions to make. Could we take them

up at a later meeting?

ACTING PRESIDENT: If you have anything to suggest we will be glad to meet with you.

MR. JUSTICE McDougall: This is just in rough form; this isn't final.

MR. KEENAN: The Court expects us to go forward immediately with our summation after the taking of testimony closes?

ACTING PRESIDENT: Yes.

Has anybody else anything to say?

All right, we will get this transcript as soon as we can.

(Whereupon, at 1500, the proceedings were concluded.)

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